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No. 79-1454

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN RESOURCES, PETITIONER

*v.*

ANNA WRIGHT AND ROLAND WRIGHT, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## REPLY MEMORANDUM FOR THE PETITIONER

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## REPLY MEMORANDUM FOR THE PETITIONER

1. Respondent is in error in suggesting (Br. in Opp. 9) that our petition sought plenary review of the mootness issue only if we prevailed on that issue in *United States Parole Commission* v. *Geraghty*, No. 78-572 (Mar. 19, 1980). To the contrary, we suggested that if the Court accepted our mootness argument in *Geraghty*, this case should be remanded to the court of appeals for reconsideration of that question (Pet. 16). We did point out that the mootness issue in *Geraghty* was "closely related" to the issue involved here and thus that the Court's decision in *Geraghty* would bear on the proper disposition of the petition in this case (Pet. 8-10).

Having reviewed the decisions in *Geraghty* and in *Deposit Guaranty National Bank* v. *Roper*, No. 78-904 (Mar. 19, 1980), we submit that, in light of the factors this

Court relied on in those cases, there are significant differences between *Geraghty* and *Roper* and this case. These factors not only make this case a logical vehicle for further consideration of the complex question of mootness in the class action context, but also require a different result here than that reached in *Geraghty* and *Roper*.

If this Court grants our petition, we will, of course, discuss those differences in detail. In brief, we submit that the Court's decision in *Roper* turned on the fact that the named plaintiffs there had *rejected* the tendered settlement and that the mere tender of settlement by a defendant should not deprive the plaintiffs of the economic advantages of prosecuting a class action (slip op. 12-14; see also Rehnquist, J., concurring, at 2). In contrast, the named plaintiffs here *accepted* the tendered payment; a holding that this acceptance rendered the case moot would not have the adverse effects identified in *Roper*.

Moreover, in *Roper* as in *Geraghty*, the Court stressed the fact that the district court had denied class certification *before* the named plaintiffs' claims had become moot. The Court therefore concluded in each case that the named plaintiffs retained an interest in appealing the adverse ruling on the class action question sufficient to prevent the expiration of their substantive claims from mooting the entire case (*Roper* slip op. 9-12; *Geraghty* slip op. 11, 13, 15-16).[1]

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[1]The Court in *Geraghty* emphasized that: "Our holding is limited to the appeal of the denial of the class certification motion. * * * We decide only that Geraghty was a proper representative for the purpose of appealing the ruling denying certification of the class that he initially defined" (slip op. 15, 18-19). This ruling, the Court noted, followed from its decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), that a named plaintiff may not take an interlocutory appeal of the denial of class certification under 28 U.S.C. 1291. See *Geraghty* slip op. 11; *Roper* slip op. 11. If interlocutory appeals of such orders had been allowed in *Livesay*, the named plaintiffs in *Geraghty* and *Roper* could have sought appellate review of the denial of class certification at a time when their substantive claims plainly had not yet become moot. In such circumstances, it was appropriate to allow them to pursue the class action question after a final judgment on the merits. In this case, however, the district court did not act on the class certification motion until *after* respondent's claim had become moot.



In neither case did the Court consider the precise issue presented here: whether a case becomes moot when the named plaintiff accepts a proffered settlement before the district court acts on his motion to certify the class.[2] In that situation, the named plaintiff cannot assert a right to appellate review of a decision made while he unquestionably retained a justiciable interest in the case. Instead, the district court had no jurisdiction to pass on the class certification question at all. Cf. *Geraghty* slip op. 15-16 (noting that if class certification was correctly denied, the claim must be dismissed as moot).[3]

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[2]The Court did suggest in *Geraghty* that the case would be moot if the named plaintiffs had lost their personal stake in the outcome *before* class certification was denied (slip op. 18 n.11), a situation closely analogous to that of respondent here.

[3]Indeed, if respondent is correct in his assertion that the district court in this case had jurisdiction to certify a class *after* his claim became moot, there would have been no need for this Court to have relied on the "capable of repetition, yet evading review" doctrine to avoid mootness in *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975). As the Court noted in *Geraghty* (slip op. 10), however, in cases such as this one that are not "inherently transitory" and where "there is no chance that the named plaintiff's expired claim will reoccur," mootness can be avoided only "through certification of a class *prior to* expiration of the named plaintiff's personal claim" (emphasis added).

In sum, this case presents the Court with the opportunity to clarify further the " 'uncertain and shifting contours' " of the mootness doctrine in the class action context (*Geraghty* slip op. 12, quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)) and to provide needed guidance to the lower courts in this area (see cases cited in *Geraghty* slip op. 2 n.2).

2. Nor can dismissal for mootness be averted on the ground that the case would otherwise become capable of repetition yet evading review. *Gerstein* v. *Pugh*, 420 U.S. 103, 110-111 n.11 (1975). Apparently recognizing that the instant controversy is not so transient in character that review would otherwise be unavailable, respondent argues that review is nonetheless required because of the Secretary's "unilateral action" in satisfying the named plaintiff's particular claims. But when, as clearly appears from our petition (pages 5-6, 9), the Secretary's payment was made in good faith and not to avoid litigation of the merits of the class claim, this extraordinary exception to the mootness doctrine does not apply.[4]

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[4]The cases cited by respondent (Br. in Opp. 11-12) are not to the contrary. *Hines* v. *City Finance Co. of Eastover*, 474 F. 2d 430, 433 n.6 (D.C. Cir. 1972), simply raises the question whether, "assuming arguendo" that defendant's action had mooted part of the case as to the named plaintiffs, the suit could still be maintained by the class; it does not resolve that question. Most of the other cases respondent cites involve situations in which the defendants did not provide the named plaintiffs with complete relief: *DeBrown* v. *Trainor*, 598 F. 2d 1069 (7th Cir. 1979); *White* v. *Mathews*, 559 F. 2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978) (in suit challenging failure to conduct prompt hearings on entitlement to disability insurance benefits, case was not mooted by agency's belated grant of hearing to named plaintiff only after class suit filed); *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28 (5th Cir. 1968); *Cypress* v. *Newport News General and Nonsectarian Hospital Association*, 375 F. 2d 648 (4th Cir. 1967); cf. *Horn* v. *Associated Wholesale Grocers, Inc.*, 555 F. 2d 270, 277 (10th Cir. 1977) (employee in civil rights case has a continuing interest in eliminating employer's patterns of discrimination).

In *Workman* v. *Mitchell*, 502 F. 2d 1201 (9th Cir. 1974), the court concluded that the district court had improperly refused to certify a class of prisoners challenging prison conditions and that the case had not been mooted by the release of three of the named plaintiffs and the transfer of the fourth after the case was on appeal. The court noted that "it would be intolerable to permit a defendant, in this manner [*i.e.*, by transferring plaintiff out of the prison] to destroy the representative capacity of a named plaintiff" (*id.* at 1208). This case is thus quite similar to *Geraghty* and *Roper*—the named plaintiffs retained their right to challenge the denial of class certification. Moreover, the court's focus on the single plaintiff whose representative capacity was destroyed by the unilateral action of the defendant distinguishes this case from the instant case, in which respondent accepted the proffered payment, thus by his own actions relinquishing his interest in the case.

Finally, Section 1776 of 7A C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1972), to which respondent also refers (Br. in Opp. 12), deals only with civil rights actions, which, as *Horn* v. *Associated Wholesale Grocers, Inc.*, *supra*, suggests, involve different considerations. Moreover, the discussion focuses on the situation in which the settlement with the class representatives occurs *after* the class has been certified and thus is itself properly before the court.



3. Respondent also contends that various sections of the Social Security Act to which we did not refer in our petition constitute a waiver of sovereign immunity with regard to retroactive payments (Br. in Opp. 17-18). He refers to four sections: (1) 42 U.S.C. 402(c), the provision defining entitlement to husband's benefits, which, by conditioning eligibility on dependency expressly *denies* benefits to those, like respondent, who cannot meet that test; (2) 42 U.S.C. 404(a), defining procedures for the retroactive readjustment of benefits administratively when more or less than the "correct" payments have been made—a provision that, like Section 402(j)(1) (to which

we referred in our petition (pages 11-12)), contemplates retroactive payment of benefits to which an individual is entitled under the terms of the statute as enacted; (3) 42 U.S.C. 405(g), which provides for judicial review of agency decisions but says nothing about the scope of the remedy available if the Secretary's decision is reversed; and (4) 42 U.S.C. 406(b), which limits attorney's fees to "25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment" and contemplates that the "past-due benefits" include simply the "total accumulated amount of benefits payable under * * * the Act" (20 C.F.R. 404.975(c)). It is obvious that none of these provisions constitutes the unequivocal waiver of sovereign immunity required by *United States* v. *Testan*, 424 U.S. 392, 399 (1976). See also *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op 3.

More generally, respondent's discussion of the sovereign immunity issue confuses the provisions that clearly permit judicial *review* of the Secretary's decision denying the award of benefits with the scope of the *remedy* the courts may award once that denial has been determined to be based on an unconstitutional requirement of the statute.[5]

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JUNE 1980

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[5]This same confusion is also evident in *Cash* v. *Califano*, No. 79-1279 (4th Cir. May 19, 1980), slip op. 14-15, which follows the decision below in granting retroactive benefits to a non-dependent widower.